



October 8, 2001

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35
Austin, Texas 78704

OR2001-4524

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152981.

The Workers' Compensation Commission (the "commission") received a written request for certain information pertaining to the commission's development of a medical fee guideline. You state that the commission has released some of the requested information to the requestor, but suggest that the following categories of information may be excepted from required public disclosure:

1. the names of the 10 commercial payers used to determine payment averages and . . . the fee schedules used to compare with the workers' compensation fee schedule [and]

. . . .

4. all documents in writing relating to the fee guideline project provided by Milliman to the TWCC that have not already been provided.

Additionally, you have notified Milliman USA ("Milliman") about this request pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public.

You first contend that "the names of the 10 commercial payers used to determine payment averages" is not "public information" for purposes of chapter 552 of the Government Code and therefore is not subject to required public disclosure. Section 552.002(a) of the Government Code defines the meaning of "public information" as follows:

In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). There are three factors to be considered when determining whether information held by a governmental body's consultant is subject to the Public Information Act: (1) the information collected by the consultant must relate to the governmental body's official business; (2) the consultant must have acted as an agent of the governmental body in collecting the information; and (3) the governmental body must have or be entitled to have access to the information. Open Records Decision No. 462 (1987); *see also* Open Records Decision No. 439 (1986).

You have provided the following explanation regarding the request for "the names of the 10 commercial payers used to determine payment averages":

The Commission entered into a Professional Services Agreement with [Milliman]. . . . The Professional Services Agreement provides that Milliman will assist the Commission in developing and implementing a Medical Fee Guideline. In fulfilling its obligations under the agreement, Milliman has utilized its own proprietary data related to medical fee payment in Texas. . . . The Commission does not possess and has never possessed, nor is it entitled to access to this information.

. . . .

Milliman was not acting as an agent of the Commission in collecting this information. . . . The fee schedules in issue were created by individual private companies for their own use in determining the fees they would pay for medical services. These schedules existed . . . prior to the Commission's contract with Milliman and their creation was not required by the Commission. Milliman independently obtains and maintains this information as part of its business of providing actuarial and health care services.

To bolster your arguments, a representative of Milliman has provided this office with additional information regarding the names of the ten commercial payers:

Milliman is a professional firm that provides actuarial and health care related services. A Milliman office based in Seattle, Washington (the Milliman contractor) entered a Professional Services Agreement ("PSA") with the TWCC, under which the Milliman contractor agreed to assist the TWCC in developing and implementing a medical fee guideline for the state of Texas. . . .

The PSA provided that in connection with creating the medical fee guideline, the Milliman contractor would perform a market analysis. As part of its analysis, the Milliman contractor was to create a summary analysis of commercial fee data Commercial fee data includes schedules of the fees various HMOs pay physicians and physician groups for each particular procedure.

. . . .

Because of the confidential nature of the fee information, the PSA provided that "[fee schedule] information may not be available as it may be considered proprietary information by most payers" In order to fulfill its obligations under the contract without compromising the proprietary and confidential nature of the commercial payers' information, the Milliman contractor obtained seven *anonymous* commercial fee schedules from a Texas based Milliman office. Three other anonymous fee schedules were provided by a third party administrator in the health care field.

. . . .

As the TWCC acknowledges, the payers' identities were not utilized in developing the Medical Fee Guideline by either the Milliman contractor or the TWCC, were never known to TWCC, and never became part of the files or workpapers of the Milliman contractor preparing the analysis.

. . . .

Even if the identities were collected by Milliman for the TWCC, which they were not, they are not "public information" under the three factor test for applicability prescribed by Open Records Decisions 462 and No. 499. First, the identities do not relate to the TWCC's official business because they were not used in connection with creating the TWCC's fee guideline. Second, the identities were not "collected, assembled or maintained" for the TWCC. To repeat: the commercial payers' identities were never utilized in developing the TWCC's fee guideline. The Milliman contractor only used anonymous fee

schedules. Third, the TWCC neither owned nor was entitled to payer-identified fee schedule information. [Emphasis in original.]

Given these representations, we conclude that the identities of the ten commercial payers whose fee schedules were utilized to prepare the "Medical Fee Guideline" for the commission do not constitute "public information" for purposes of section 552.002(a) of the Government Code. Accordingly, this information need not be released to the requestor. On the other hand, neither you nor Milliman argue that the anonymous fee schedules used to prepare the Medical Fee Guideline are exempt from required public disclosure. Consequently, these schedules must be released to the requestor in their entirety.

We now address whether the information requested in item 4, *i.e.*, "all documents in writing relating to the fee guideline project provided by Milliman to the TWCC that have not already been provided," must be released to the requestor. You have submitted to our office as responsive to this request Milliman's draft versions of its analysis. You have raised no exception to disclosure for this information on behalf of the commission, but rather suggest that "[i]t appears that Milliman's contention may be that these drafts are exempt from disclosure pursuant to Texas Government Code § 552.111." However, Milliman has not raised any specific exception to required public disclosure regarding this information. Rather, Milliman merely argues that "the drafts are confidential because they represent interim analyses subject to change." Because neither you nor Milliman have demonstrated that the draft documents come within an exception to required public disclosure, we conclude that these documents must be released to the requestor in their entirety, with the following exceptions.

We note that some of the records at issue contain e-mail addresses. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.¹ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

¹House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Accordingly, section 552.137 of the Government Code requires the commission to withhold the e-mail addresses of members of the public contained in the records at issue, unless the communicant has affirmatively consented to its release.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

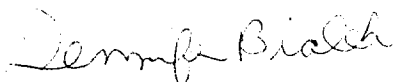
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/RWP/seg

Ref: ID# 152981

Enc. Submitted documents

c: Mr. Harold Freeman
Texas Medical Association
401 West 15th Street
Austin, Texas 78701-1680
(w/o enclosures)

Mr. Arthur L. Baldwin III, FSA, MAAA
Milliman USA
1301 Fifth Avenue, Suite 3800
Seattle, Washington 98101-2605
(w/o enclosures)

Mr. R. Timothy Muth
Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C.
1000 North Water Street
P.O. Box 514000
Milwaukee, Wisconsin 53203-3400
(w/o enclosures)